



King's Research Portal

Document Version
Peer reviewed version

[Link to publication record in King's Research Portal](#)

Citation for published version (APA):

Galletti, G. M. (2014). 'A Further Step towards a 'Proceduralisation' of the Market Economy Investor Test: Annotation on the Judgment of the Court of Justice (Grand Chamber) of April 3, 2014, in European Commission v Netherlands (C-224/12 P). *EUROPEAN COMPETITION LAW REVIEW*, 35(10), 509-514.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537136&rec=1&srcabs=2692201&alg=1&pos=2

Citing this paper

Please note that where the full-text provided on King's Research Portal is the Author Accepted Manuscript or Post-Print version this may differ from the final Published version. If citing, it is advised that you check and use the publisher's definitive version for pagination, volume/issue, and date of publication details. And where the final published version is provided on the Research Portal, if citing you are again advised to check the publisher's website for any subsequent corrections.

General rights

Copyright and moral rights for the publications made accessible in the Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognize and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the Research Portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the Research Portal

Take down policy

If you believe that this document breaches copyright please contact librarypure@kcl.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



A Further Step Towards a “Proceduralisation” of the Market Economy Investor Test

**Annotation on the Judgment of the Court of Justice (Grand Chamber) of April 3, 2014,
in *European Commission v Netherlands* (C-224/12 P)**

Gian Marco Galletti

I. Introduction

A considerable number of State aid decisions have been adopted by the European Commission in the context of the financial crisis and thousands of papers have been written about it. Yet, only twice have the European judges been requested to rule on the legality of those decisions.¹ The first opportunity to give clarifications in that respect arose in case *ING*. At the heart of the dispute between the Commission and Netherlands State lies the application of the Market Economy Investor Test (“MEIT”, “private investor test” or simply “the test”). The appeal judgment² – which will be here commented upon – clarifies that the Commission cannot evade its obligation to assess the economic rationality of an amendment to the repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constitutes State aid. The reasoning unfolds by the Court in its judgment – which can be undoubtedly defined as overly concise – confirms however the presence of two trends in European case law. The first is the increasingly clear attempt to “proceduralise” the application of MEIT in order to respond to the lack of legal certainty inherent in the nature of the test itself.³ The second, which emerges from the most recent jurisprudence, is the gradual shift from the traditional profit-oriented paradigm of private investor to the different model of “reasonable investor”. In those two respects, as it will be better explained below, the ruling must certainly be welcomed by the legal community.

II. The case and background to the dispute

· PhD Candidate at King’s College, London.

¹ Judgment of 8 April 2014, *Abn Amro Group NV v European Commission*, T-319/11, EU:T:2014:186 and the judgment under discussion.

² Judgment in *Commission v Netherlands and ING Groep NV*, C-224/12 P, EU:C:2014:213.

³ See De Cecco F., *State Aid and the European Economic Constitution*, Oxford, Hart 2013, chapter 4.

At the height of the financial crisis, the Dutch State adopted various aid measures in favour of the bank ING in order to maintain the continuity of the payment system and the inter-bank market in the Netherlands. The first aid measure consisted of an increase in capital through the creation of one billion securities fully subscribed by the Dutch State at an issue price of EUR 10 per security. The measure was designed to enable ING to increase its “Core-Tier 1” base capital⁴ by EUR 10 billion. Pursuant to the repayment terms laid down in the agreement on subscription of capital entered into by the Netherlands and ING, the securities could have been, on ING’s initiative, either repurchased at EUR 15 per security (amounting to a 50% redemption premium when compared with the issue price) or, after three years, converted into ordinary shares. Should ING choose the latter option, the Dutch authorities would have however been able to get the securities redeemed by ING at the unit price of EUR 10 plus accrued interests. A coupon (interest payment) on the securities would have been paid to the State on the condition that a dividend was paid by ING on ordinary shares. The second aid measure was an exchange of cash flows applied to ING’s impaired assets in relation to a portfolio of residential mortgage-backed securities granted in the United States, whose value had dramatically declined.⁵

On 18 November 2008, the decision of the Commission found that the capital injection constituted State aid. However, the measure was declared compatible with the internal market and provisionally approved for a period of six months. Furthermore, the Commission informed the Netherlands State that if a credible restructuring plan had been submitted before the expiry of that deadline, the validity of the compatibility decision would have automatically been extended until the Commission has adopted a final decision on that plan. The same procedure was followed as far as the impaired asset relief measure was concerned. A first restructuring plan, submitted by the Dutch authorities in May 2009, was rejected by the Commission. Following a further round of discussions, a revised plan was presented in October 2009. The new plan included an amendment to the repayment terms in relation to part of the capital injection. According to the new terms, ING was allowed to repurchase up to 50% of the Core-Tier securities at the issue price (EUR 10) plus an accrued interest on the 8.5% annual coupon and an early redemption premium to be paid in case ING’s share price traded above EUR 10.

On 18 November 2009, the Commission adopted a final decision.⁶ In that decision, it held that ING had received a total aid of EUR 17 billion (“the restructuring aid”), including the capital injection (EUR 10 billion), the impaired asset relief measure (EUR 5 billion) and, crucially, an additional aid of approximately EUR 2 billion⁷ resulting from the amendments to the terms for the repayment of the capital injection. However, the aid measures was

⁴ According to the Business Dictionary, the Core-Tier 1 base capital is the “*first part of the two-tier risk based capital standard commonly used by regulatory agencies (such as a central bank) to assess a financial institution’s capital adequacy*”.

⁵ The third aid measure, which was in question in the present proceeding, consisted of guarantees on ING liabilities amounting to USD 9 billion and to EUR 5 billion. Those guarantees were granted by the Dutch State in return for a fee.

⁶ 2010/608/EC: Commission Decision of 18 November 2009 on State aid C10/09 (ex N 138/09) implemented by Netherlands for ING’s Illiquid Assets Back Facility and Restructuring Plan [OJ L274, 19.10.2010, p. 139-162].

⁷ *Ibidem*, para. 34, according to which the additional advantage granted to ING was between EUR 1.79 to 2.2 billion, depending on the market price of ING shares.

approved under Article 107(3)(b) TFEU on the basis that they were necessary to remedy a serious disturbance in the economy of the Netherlands.

The Commission's decision was challenged by the Dutch State and ING before the General Court.

III. The ruling of the General Court

The General Court delivered its ruling on 2 March 2012.⁸ It partially annulled the contested decision as it found that the latter was vitiated by various errors in law. According to the General Court, the Commission could not limit itself to finding that the amendment to the repayment terms of the capital injection constituted by its very nature State aid, without assessing whether that amendment conferred on ING an advantage to which a private investor would not have agreed.⁹ This evaluation would have notably presupposed a comparison between the initial and the amended repayment terms. By contrast, the Commission did not go beyond stating that the amendment to the repayment terms resulted in a loss of resources for the Dutch State. Should the Commission have applied the private investor test, the measure at hand would have probably complied with the latter for two essential reasons. First, in General Court's view the remuneration owed to the State was not to be calculated on the supposed requirement that ING complied with the initial terms in the event of early repayment, as the Commission actually did. In this respect, the EU judiciary opined that the original terms did not set out an obligation, but provided for a mere option for ING to repurchase the securities subscribed by the Netherlands within the established three-year period. Only the amendment terms would have therefore given the Netherlands State the certainty of reimbursement.¹⁰ Second, the General Court held that the Commission had wrongly adopted its decision without taking into account relevant information and examining its effects on the assessment of the measures at issue.

Having regard to those findings, the General Court quashed the whole operative part of the decision, including the classification of the measures concerned as aid (Article 2, para. 1), the statement of its compatibility with the internal market (Article 2, para. 2) and the commitments undertaken by ING (Annex II).

The Commission brought an action for annulment against this pronouncement. The relevant ground of appeal put forward by the State aid watchdog was that the General Court had been wrong to consider that the private investor test should have been applied to the amendment to the repayment terms. In that regard, it argued that that amendment could not be assessed in isolation from the aid granted through the capital injection as it formed an integral part of the latter.

IV. Advocate General's Opinion

On 19 December 2013, Advocate General Sharpston issued her Opinion in the case under consideration.¹¹ In the first place, she clarified that the main ground of appeal concerned the applicability, as opposed to the application, of the MEIT. In other words, the question to be

⁸ Judgment of 2 March 2012, *Netherlands and ING Groep NV v Commission*, T-29/10, EU:T:2012:98.

⁹ *Ibidem*, para. 99.

¹⁰ *Ibidem*, para. 116.

¹¹ Opinion delivered by Advocate General Sharpston in *Commission v Netherlands and ING Groep NV*, C-224/12 P, EU:C:2013:870.

addressed was whether the State's conduct was such that it could meaningfully be compared with an act of a private investor. According to the Advocate General, two approaches could be envisaged in this respect. First, reassessing the capital injection as a whole by replacing the original repayment terms with the amended terms. Second, evaluating the amendment to the terms as a separate measure. While the first approach would have led to the conclusion that no meaningful comparison could be drawn with the behaviour of a private investor, the second approach would have entailed the opposite outcome, namely the applicability of the MEIT to the measure at hand. As the Advocate General noted, the Commission had however adopted the second approach in its decision. Insofar as the latter had assessed the amendment to the repayment terms as a separate measure, the Advocate General dismissed as contradictory Commission's argument that that amendment was inseparable from the capital injection and was thereby to be assessed in accordance with the same criteria.¹² Since the amendment to the repayment terms had to be appraised as a separate measure, the Advocate General observed, the comparison between State's conduct and the behaviour of a private investor was doable. As a consequence of its initial grant, the Dutch State had become holder of securities that could be possibly redeemed under specific terms. The Advocate General took the view that also a private holder of securities may wish or agree to renegotiate the conditions of their redemption.¹³ Hence, she suggested to dismiss this ground of appeal.

V. The ruling of the Court of Justice

The Court of Justice issued its judgment on 3 April 2014.¹⁴ With regard to the main point of law under assessment, the appeal instance first upholds the distinction drawn by the Advocate General by making clear that the debate before the General Court did not regard the application of the MEIT but rather the applicability of the latter test.¹⁵ On the basis of this premise, the Court recalls that the test must be considered applicable whether State intervention is to be classified as a decision adopted by a shareholder of the undertaking concerned. In addition, as the Court states echoing EDF ruling, the test is one of the factors that the Commission is bound to take into account for the purpose of ascertaining the existence of an aid within the meaning of Article 107(1) TFEU and it is for the Commission itself to ask the Member State concerned the relevant information for determining whether the test is applicable or not. These principles are not invalidated by the mere fact that what is at stake is the applicability of the MEIT to an amendment to the conditions for the redemption of securities acquired in return for State aid. The Court thus endorses the applicability of the test as it finds that also a private holder of securities could find himself in the same situation as that of the Dutch State.¹⁶ The claim laid by the Commission in this regard is thereby rejected. In this context, the Court also points out that the amendment to the repayment terms of the capital injection must be considered as fulfilling the private investor

¹² *Ibidem*, para. 40.

¹³ *Ibidem*, para. 41.

¹⁴ Judgment in *Commission v Netherlands and ING Groep NV*, (fn. 2), EU:C:2013:870.

¹⁵ *Ibidem*, para. 29.

¹⁶ *Ibidem*, para. 35.

test provided that it meets an “economic rationality test”, so that a private investor might also be in the position to accept such an amendment.¹⁷

VI. Analysis

The case at issue – it is submitted – deserves further consideration in three respects: (i) it singles out two different stages within the MEIT assessment, (ii) it concerns the debated question in which cases consecutive public measures should be assessed as a single intervention and (iii) it substantially broadens the range of considerations which should be taken into account for the purpose of the application of the MEIT by referring to the comparison embodied in the test as an “economic rationality test”.

1. One step forward in the “proceduralisation” of the MEIT assessment

The MEIT has two dimensions. The first – the economic one – entails that the assessment does not overly depart from economic reality. The second – the legal one – requires the economic rationality to be accommodated into legal rationality, with particular regard to principles such as legal certainty. The wide margin of discretion left to the Commission in its application has led to a clear imbalance towards the economic dimension of the test, which has in turn attracted harsh criticisms.¹⁸ In its *EDF* judgment,¹⁹ the Court of Justice attempted to frame Commission’s discretion by determining the procedural steps to be followed for the purpose of the MEIT assessment. The starting point is that the test “*is not an exception that applies only if a Member State so requests*” but “*is among the factors which the Commission is required to take into account for the purpose of establishing the existence of [an] aid*”.²⁰ As a result, the Commission is under a duty to request the Member State concerned, and later examine, the relevant information to determine whether the private investor test is applicable to the case under consideration.²¹ Subsequently, as the Court added, the Commission must carry out a “global assessment”, taking also into account all the relevant evidence other than those provided by that Member State.²² In the *ING* judgment, the Court builds on its former precedent by endorsing the clear distinction advocated by Advocate General Sharpston between the two stages of the assessment implied by the private investor test, namely applicability and application. The Opinion of the Advocate General discussed the matter in greater length. Most importantly, it clarified that the relevant question to be answered when considering the applicability of the test is whether the State’s conduct is such that it can meaningfully be compared with an act of a private operator. If the response is in the positive, the application of the test involves assessing whether the same action was determined by

¹⁷ *Ibidem*, para. 36.

¹⁸ Parish M., *On the private investor principle*, European Law Review 2003, v. 28, n. 1, February, p. 70-89.

¹⁹ Judgment in *Commission v Électricité de France*, C-124/10 P, EU:C:2012:318. See, *inter alia*, Baeten L. and Gam L., *Tax Measures and the Private Investor Test: The Court of Justice endorses a level playing field. Annotation on the Judgment of the Court of Justice (Grand Chamber) of 5 June 2012 in Case C-124/10 P – Commission v EDF*, EStAL 2013, v. 12, n. 3, p. 544-550.

²⁰ *Ibidem*, para. 103.

²¹ *Ibidem*, para. 104. Contrary to what has been held by Sanchez Graells A., *Bringing the “market economy agent” principle to full power*, European Competition Law Review 2012, v. 33, n. 10, p. 470-474, the Court did not imply the general applicability of the private investor test as it seems apparent from the wording of this paragraph (“*where it appears that the private investor test could be applicable*”).

²² *Ibidem*, para. 86.

circumstances which are relevant only or at least primarily to the State in its capacity as public authority or it might have been taken in comparable market conditions by a private operator in a situation as close as possible to that of the State.²³ The attempt made by the European judges to undertake a “proceduralisation” of the MEIT assessment is not of little importance. Quite on the contrary, it should be commended insofar as it goes to the direction of achieving a more satisfactory balance between the two dimensions of the private investor test.

2. Consecutive State measures as a single intervention

In the present case, the Court was called to settle the legal question concerning the applicability of the private investor principle to the amendment to the repayment terms included in ING’s revised restructuring plan.. Surprisingly, the European judicature cuts off the issue in six paragraphs. It recalls first that the applicability of the test depends on whether the measure under assessment serves an economic aim which could also be pursued by a private investor and that the Commission must request to Member States the provision of the relevant information. It then states that the application of that case law cannot be compromised merely because the measure under consideration is an amendment to the conditions for the redemption of securities acquired in return for State aid. Finally, the Court concludes that the MEIT is applicable since also a private holder of securities might potentially be in the position to wish or agree to amend the conditions of their redemption. In my view, there is a significant gap between the last two statements (paragraph 34 and 35 of the ruling): the Court fails to recognise the major legal issue at stake in the present case, namely whether consecutive State measures, such as the capital injection to the benefit of ING with its original repayment terms and the subsequent amendment to those terms, must be regarded as a single intervention or as separate measures for the purpose of the MEIT assessment. The Opinion of the Advocate General made perfectly clear that the choice between those two approaches crucially affects the final decision on the merits of the dispute. If the amended repayment terms are deemed to be an integral part of the capital injection and, consequently, fell to be assessed on the same basis as the original terms, the private investor test is not applicable as the capital injection was incontestably made by the Dutch State “*in its capacity as supreme public authority concerned with the stability of national economy as a whole*”.²⁴ Conversely, should the amendment to the repayment terms be considered as a separate measure, it becomes meaningful to compare the conduct of the State in that regard with that of a private investor in a comparable position. As the Commission had in fact adopted the second approach – the Advocate General concluded – there was no real need in the present case to determine which approach is the correct one.²⁵ The reasoning of the Court gives no account of this crucial passage: this warrants the conclusion that every public measure needs to be subject to an individual assessment as far as the applicability of the

²³ Advocate General Sharpston’s Opinion in *Commission v ING*, (fn. 12), para. 35. Conversely, the previous case law tended to merge the two stages when carrying out the assessment.

²⁴ *Ibidem*, para. 37.

²⁵ *Ibidem*, para. 39. However, the Advocate General subsequently seemed to suggest that the reassessment of the capital injection as a whole, including the repayment terms, would be the right approach. See, in this regard, para. 42.

private investor test is concerned.²⁶ This interpretation would nonetheless be at odds with the Draft Commission Notice on the Notion of Aid (“the Draft Notice”),²⁷ recently adopted in the framework of the on-going general reform of State aid regime. According to the Draft Notice, the case law as it currently stands states unequivocally that several consecutive measures of State intervention may be regarded as a single intervention on the condition that those measures are “closely linked to each other”. Relevant factors in this respect are their chronology, their purpose and the circumstances of the beneficiary at the time of the interventions at issue.²⁸ For instance, in *BEP Chemicals* the General Court took the view that the third capital injection made by the public-owned company ENI to the benefit of its subsidiary EniChem was to be assessed jointly with the previous two injections given that: (i) ENI’s Board of Directors had decided to make each of them during a short period of time, (ii) the capital injections had the common purpose of financing the necessary restructuring measures and restoring EniChem’s capital base which had been eroded by losses and (iii) the adoption of the third capital injection was imperative to achieve that purpose and avoids liquidation.²⁹ Consequently, the private investor test was not found to be applicable to the third capital injection.

Therefore, the Court cannot refrain from considering this legal issue without implying a *revirement jurisprudentiel* that in itself should have been better articulated. By contrast, neither does the Court make such an appraisal, nor does it justify its decision on the same ground as the Advocate General.

3. “Economic rationality test”: room for a late acceptance of the “reasonable investor”

At the issue of its reasoning concerning the applicability of the MEIT to the amendment to the repayment terms, the Court adds an *obiter dictum*³⁰ that deserves further consideration. According to the European judicature, the application of the private investor test would require to ascertain “whether that amendment has satisfied an “economic rationality test”, so that a private investor might also be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of [the capital] injection”.³¹ To my knowledge, this is the first time that the European judges employ such a wording to define the assessment inherent in the MEIT. Referring to an “economic rationality test” and hinting at the fact that the prospects of obtaining the repayment of the capital injection (plus accrued interests) are not the only considerations to be taken into account when applying the test (“in

²⁶ The inconsistency is also highlighted in Biondi A., Buendia Sierra J.L., Galletti G.M. and Stefan O., *Comments on the Draft Commission Notice on the Notion of State Aid pursuant to Article 107(1) TFEU*, available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428771.

²⁷ Draft Commission Notice on the Notion of State Aid pursuant to Article 107(1) TFEU, available on http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf.

²⁸ *Ibidem*, para. 84.

²⁹ Judgment of 15 September 1998 in *BP Chemicals v Commission*, T-11/95, EU:T:1998:199, paras. 179-180. See also Judgments of 13 September 2010 in *Greece and Others v Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386 and in *Bouygues SA, Bouygues Telecom SA v Commission*, C-399/10 P and C-401/10 P, EU:C:2013:175, para. 104.

³⁰ The Oxford Dictionary defines it as follows: “A judge’s expression of opinion uttered in court or in a written judgment, but not essential to the decision and therefore not legally binding as a precedent”.

³¹ Fn. 23.

particular”)³² carries a major implication. Indeed, it may open the doors of the private investor test to the considerations of social nature that are encompassed in the notion of “reasonable investor”, originally suggested by former Advocate General Van Gerven in *Alfa Romeo*.³³ The defining feature of this notion is that it includes the category of “stable investors” in addition to the “ordinary investors”. The former private actors, which either own controlling participations of an undertaking or wish to acquire them, are not only guided by prospects of profitability over a longer period of time than ordinary investors, but also factor in “considerations of employment and economic development in a given region or sector”.³⁴ Although the “reasonable investor test” was dismissed by the Court in *Alfa Romeo*,³⁵ the entry into force of the Lisbon Treaty – it is submitted – calls for a second thought on this matter. By reframing EU values and objectives in ways that seek to bridge the gap between the economic and social dimension of European integration,³⁶ the Treaty should prompt a shift from the traditional paradigm of private investor³⁷ to the reasonable investor, which allows account to be taken to social, environmental and regional-policy considerations. The recent judgment delivered by the General Court in *Corsica Ferries*³⁸ endorses the present exegesis of the wording “economic rationality test”. This case revolved around the question whether the costs of additional redundancy payments – which did not constitute a legally binding obligation for the parent company involved – were to be included in the overall cost of liquidation of one of its subsidiaries for the purpose of the application of the MEIT. The General Court answered in the positive in a paragraph which deserves to be fully quoted: “*It should also be noted that, in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop. The challenges relating to social responsibility and the entrepreneurial context are, in actual fact, capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor. The long-term economic rationale of a reasonable private entrepreneur’s conduct cannot therefore be assessed without taking into account such concerns*”.³⁹

The “economic rationality test” mentioned by the Court in the judgment discussed could therefore be construed as encompassing the same considerations as the ones taken into

³² In the same vein, see Advocate General Sharpston’s Opinion, para. 35, (fn. 12), p. 5, which suggests that the private investor test must not be regarded as fulfilled in the event that the State’s action was determined by considerations which are relevant only *or at least primarily* to the State in its capacity as public authority.

³³ Opinion delivered by Advocate General Van Gerven in *Italy v Commission*, C-305/89, EU:C:1991:4.

³⁴ *Ibidem*, para. 24.

³⁵ With regard to the reasons underlying the rejection, see Rubini L., *The definition of subsidy and state aid: WTO and EC law in a comparative perspective*, Oxford University press, 2009, p. 206.

³⁶ For instance, Article 3 TEU includes among EU objectives “a highly competitive social market economy”, Article 9 TEU lays down a “horizontal social clause” and a new EU competence is created for service of general interest. In this respect, see Liebert U., *Reconciling market with Social Europe: The EU under the Lisbon Treaty*, in Schiek D., Liebert U. and Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge University Press, 2011.

³⁷ For a comprehensive picture of the traditional paradigm, see Nicolaidis F. and Rusu I.E., *Private Investor Principle: What Benchmark and Whose Money?*, EStAL 2011, v. 10, n. 2, p. 237-248.

³⁸ Judgment of 11 September 2012, *Corsica Ferries France SAS v Commission*, T-565/08, EU:T:2012:415, currently under appeal.

³⁹ *Ibidem*, paragraph 82.

account in the context of the reasonable investor test, firstly proposed by former Advocate General Van Gerven and recently resumed by the General Court in *Corsica Ferries*.

VII. Conclusion

An accurate assessment of the judgment issued by the Court of Justice in *ING* must distinguish its merits from its flaws. Both relate to the test used by the Commission in order to ascertain the presence of an advantage within the meaning of Article 107(1) TFEU, that is the private investor test. As a first remark, this judgment reduces the unpredictability inherent in the MEIT assessment by clearly determining the procedural stages of Commission's scrutiny, namely the applicability and application of the test. Admittedly, this development should be welcomed. However, when assessing the applicability of the test to the amendment to the repayment terms included in the agreement between the Dutch State and ING, it fails to assess whether consecutive State measures must be deemed as a single intervention. Should the European judges intend to imply that the applicability of the private investor test must be individually determined for every single public measure, they should have better explained the reasons on which this finding is based. In any event, the uncertainties surrounding the applicability of MEIT to Member States' consecutive interventions in favour of their national banks cannot be considered removed. As to the application of the test, the characterisation of the MEIT in terms of an "economic rationality test" represents an appreciated step forward towards a better alignment of the principle with the current economic reality.